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December 12, 2003

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Room TW-A325
Washington, D.C. 20554

Filed via Electronic Filing

Re: *Ex Parte* Presentation in the Proceeding Entitled "Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process" – WT Docket No. 03-128

Dear Ms. Dortch:

On Thursday, December 11, 2003, the following individuals, representing the companies or associations indicated, met with officials of the Commission:

James Goldstein -	Nextel Communications, Inc.
David Jatlow –	AT&T Wireless Services, Inc.
Jay Keithley -	PCIA – The Wireless Infrastructure Association
Andre J. Lachance -	Verizon Wireless
H. Anthony Lehv –	American Tower Corporation
Tony Russo –	T-Mobile USA, Inc.
Roger Sherman -	Sprint Corporation
Andrea Williams -	The Cellular Telecommunications and Internet Association ("CTIA")
John Clark –	Perkins Coie LLP

The Commission officials attending the presentation were as follows:

John Branscome -	Wireless Telecommunications Bureau ("WTB")
Aliza Katz	Office of General Counsel ("OGC")
Amos Loveday	WTB
Jeffrey Steinberg	WTB

[10194-1515/DA033450.053]

Frank Stilwell WTB
Gerald Vaughan WTB

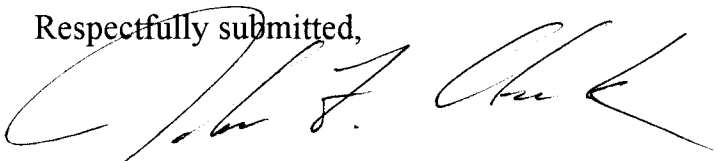
At this presentation, the representatives from industry discussed the fact that House Resources Committee Chairman Richard Pombo and National Parks Subcommittee Chairman George Radanovich recently sent a letter (the "Pombo/Radanovich letter") to John Nau, Chairman of the Advisory Council on Historic Preservation ("ACHP") with a copy to Chairman Michael Powell, expressing concern about the ACHP's interpretation of Section 106 of the National Historic Preservation Act ("NHPA").

In the letter, the Chairmen described their concern that ACHP's rules extended coverage of Section 106 to properties "only 'potentially eligible' for the National Register of Historic Places," and this change in federal law has "particularly burdened" the wireless telecommunications industry. The Chairmen also asked the ACHP to "consider addressing and correcting this problem in the Council's current rulemaking, and/or in the programmatic agreement negotiations with the Federal Communications Commission and the National Conference of State Historic Preservation Officers (NCSHPO)."

At the meeting, the industry representatives asked the Commission representatives what impact the Pombo/Radanovich letter might have on the development of the Nationwide Programmatic Agreement ("NPA") that is the subject of this proceeding. The industry representatives also restated the positions that they had each expressed in the comments filed in this proceeding. The Commission representatives stated that they were not aware what effect, if any, the Pombo/Radanovich letter might have, but to be successful at this late stage of the proceeding, they felt that any changes relating to that issue would probably have to be proposed by the ACHP and/or the NCSHPO.

Industry representatives presented to the Commission representatives a copy of the comments that PCIA submitted to the ACHP in response to the Notice of Proposed Rulemaking released by the ACHP in the currently open proceeding entitled "Protection of Historic Properties Notice of Proposed Rulemaking, RIN 3014-AA27." A copy of the comments presented is attached as Attachment 1.

Respectfully submitted,



John F. Clark
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JFC:jfc

Attachment 1

Before the
ADVISORY COUNCIL ON HISTORIC PRESERVATION
Washington, DC 20004

Protection of Historic Properties	)	
Notice of Proposed Rulemaking	)	RIN 3014-AA27
	)	
36 C.F.R. Part 800	)	
	)	

To: The Executive Director

PCIA COMMENTS

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Before the
ADVISORY COUNCIL ON HISTORIC PRESERVATION
Washington, DC 20004

Protection of Historic Properties	)	
Notice of Proposed Rulemaking	)	RIN 3014-AA27
	)	
36 C.F.R. Part 800	)	
	)	

To: The Executive Director

INTRODUCTION

PCIA, the Wireless Infrastructure Association ("PCIA"), submits these comments regarding the amendments to the rules of the Advisory Council on Historic Preservation ("ACHP") proposed in its Notice of Proposed Rulemaking ("Notice") published in the Federal Register on September 25, 2003.[1]

BACKGROUND AND SUMMARY

In the Notice, the ACHP proposes several amendments to its rules implementing the National Historic Preservation Act ("NHPA"), found at 36 C.F.R. Part 800. Most of the proposed amendments respond to federal court decisions from the D.C. District Court and the D.C. Circuit Court of Appeals, but others seek changes proposed by the ACHP on its own motion.

First, the ACHP proposes to amend sections 800.4(d) and 800.5(c) of its rules to comport with the decision of the D.C. District Court holding that the ACHP lacks authority to overturn agency findings of "no historic properties affected" or "no adverse effect." Specifically, the ACHP proposes to require that any federal agency that receives a timely objection to a finding of "no historic properties affected" or "no adverse effect" must submit the finding to the ACHP, which may then issue an opinion to the agency official or agency head. Thereafter, "[t]he agency official, or the head of the agency, as appropriate, would be required to provide the ACHP with a summary of the final decision that contains the rationale for the decision and evidence of consideration of the ACHP's opinion."[2] The proposed amendment would also increase from 15 to 30 days the time period for the ACHP to issue its advisory opinion on "no adverse effect" findings and objections thereto.

Second, the ACHP proposes to amend section 800.16(y) to reflect the decision of the D.C. Circuit Court of Appeals holding that Section 106 does not apply to

[1] 68 Fed. Reg. 55354 (Sept. 25, 2003).
[2] *Id.* at 55355.

undertakings that are merely subject to state or local regulation administered pursuant to a delegation or approval by a Federal agency. Third, the ACHP proposes to amend sections 800.4(d)(1)(i) and 800.5(c)(1) to clarify that even if a State Historic Preservation Officer ("SHPO")/Tribal Historic Preservation Officer ("THPO") concurs in a "no adverse effect" finding, the ACHP and any consulting party will have until the end of the 30-day review period to file an objection. Fourth, the ACHP proposes to amend section 800.14 to permit the ACHP to propose an exemption to the Section 106 process on its own initiative.

PCIA takes issue with the stated purpose of the proposed amendments and with the legally questionable foundation in the current Section 106 rules upon which the amendments are to rest. In addition, PCIA opposes the proposed amendments to sections 800.4(d) and 800.5(c) as written. The proposed amendments would impose burdensome procedures that cannot be implemented in a reasonable and timely fashion by the ACHP, and they would add additional, unreasonable and unnecessary delay and expense to the Section 106 process.

PCIA AND SECTION 106

PCIA is the principal trade association representing the wireless telecommunications and broadcast infrastructure industry. PCIA members design, develop, construct and manage wireless communications and broadcast towers and related antenna facilities. PCIA members own or manage more than 50,000 towers supporting analog, digital and broadband services across the country. In the digital wireless age now unfolding, towers are the indispensable infrastructure upon which the country's communications networks are built, and on which much of our country's economy, public safety, and national security now depend.

As the leading national association representing wireless infrastructure providers, PCIA monitors federal, state and local laws and regulations that impact its members and others in the industry. Section 106 and the ACHP's regulations implementing Section 106 are among the federal laws with the greatest impact on tower and facilities siting, because the Federal Communications Commission ("FCC") asserts that it has delegated most of its responsibility for Section 106 compliance to applicants for FCC licenses and tower registrations. In 2000 and 2001, the ACHP expressly acknowledged and approved the FCC's delegation of responsibilities in connection with communications towers.[3]

Due to the FCC's liberal delegation of Section 106 responsibilities and authority, and the expanding scope and nature of wireless communications network development in the United States, PCIA members have developed a unique body of experience with Section 106 procedures in every state and territory. PCIA members interact virtually every day with the Section 106 process, SHPOs, THPOs, Indian tribes and a myriad consulting parties of all kinds. These experiences have provided PCIA with a unique perspective and a keen understanding of how the Section 106 process works in practice,

[3] 65 Fed. Reg. 77698 (Dec. 12, 2000) (new rules effective January 11, 2001).

what changes are needed, and what will and will not improve the efficacy or efficiency of the process.

It is from this perspective of long experience that PCIA submits this critique of the proposed amendments to the ACHP rules, and to the underlying rules themselves. The Section 106 process set forth in the current rules, which the amendments would extend, wastes scarce public and private resources, as well as public confidence and good will, on a process that encourages unfocused consideration of too wide a range of potential effects, on too many properties, to too little purpose.

DISCUSSION

Over the years, PCIA and its members have learned the sad and difficult fact that, as applied to telecommunications tower projects, the Section 106 process protects very few real historic properties compared to the vast number of consultations required. Equally troubling, a relative handful of cases of actual effect are processed at an unnecessarily high and unsustainable cost, both to private industry and government at the state and federal levels. PCIA urges the ACHP to acknowledge these issues, and refocus the Section 106 process on that small number of projects that pose real threats of damage or destruction to highly significant historic properties.

I. The Stated Purpose Underlying these Amendments is Legally Questionable

The ACHP states in the Notice that the purpose of these amendments, and indeed by implication the purpose of Section 106 itself, is "helping federal agencies avoid proceeding with a project under an erroneous determination that the project would not affect or adversely affect historic properties."[4] This stated purpose is inconsistent both with the terms of Section 106 and with federal judicial interpretation of the limits of ACHP authority under the NHPA.

The two clear purposes of Section 106 are: (1) to require federal agencies to take into account the effects of their undertakings on historic properties; and (2) to afford the ACHP a reasonable opportunity to comment on such effects.[5] The D.C. District Court in NMA v. Slater ruled that the making of determinations of effect is "the one substantive role that is expressly delegated to the agency in Section 106" and is therefore "solely the responsibility of that agency under Section 106."[6] The Slater court held that the ACHP may not supplant or reverse an agency's determination of effect, even temporarily, and may not require continuation of the Section 106 process when the agency has made determinations that otherwise would terminate the consultation procedure.

It would seem that the proposed amendments should be directed at effectuating the goals and limitations expressed in the Slater case. The ACHP, however, has gone

[4] 68 Fed. Reg. 55354, 55355 (Sept. 25, 2003).
[5] 16 U.S.C. § 470f.
[6] National Mining Association v. Slater, 167 F. Supp. 2d 265, 288, 289 (D.D.C. 2001) ("Slater").

further, and used these amendments to establish a principle neither found in the NHPA, nor allowed by court decisions.

The heart of the District Court's ruling on this point in Slater is that Section 106 expressly gives to the agency, and not to the ACHP, the responsibility of making determinations of effect. The fact that a SHPO or the ACHP disagrees with an agency's finding of "no effect" or "no adverse effect" does not make the finding "erroneous." Accordingly, amendments to the Section 106 rules that are intended to advance a purpose that is itself erroneous, are legally suspect on that ground alone.

The ACHP has, in other contexts, expressed a goal for the implementation of Section 106 that admirably balances historic preservation concerns and agency responsibilities in a more realistic recognition of the extremely limited resources available to government to advance historic preservation goals. PCIA believes that a similar goal should be adopted in this proceeding. The ACHP has stated:

> Historic preservation concerns can and should be accommodated expeditiously in a way that focuses on the extremely small percentage of Federal or federally assisted projects that might have adverse effects on highly significant and historic facilities.[7]

As with other scientific and technical facilities addressed in the Balancing Needs Report, the rapid development of wireless telecommunications networks is an important national priority, upon which this country's economy, public safety and national security increasingly depend. PCIA agrees with ACHP that the FCC can address legitimate historic preservation concerns in connection with its other duties. The recognition of the critical national importance of rapid and efficient development of these networks, however, should serve to emphasize the importance of making sure that Section 106 is applied as efficiently and expeditiously as possible. One way to do this would be to apply the ACHP's own suggestion and focus the Section 106 process for telecommunications facilities on the small number of projects that may actually cause physical damage or destruction to highly significant properties.

II. The Amendments Do Not Seek to Allow Section 106 to Proceed as Expeditiously as Possible

1. Findings of "No Historic Properties Affected." The proposed revisions to section 800.4(d) would add a new ACHP review procedure and a mandatory 30-day review period whenever a SHPO/THPO or the ACHP "objects" to an agency finding of "no historic properties affected." This new procedure exceeds the standards explained in the Slater case, in that it imposes a further procedural requirement, after the agency has made a determination of effect, which additional requirement is obviously designed to put

[7] ACHP, "Balancing Historic Preservation Needs with the Operation of Highly Technical or Scientific Facilities," (1991) (the "Balancing Needs Report"), *available at* http://www.achp.gov/balancingsum.html.

pressure on the agency to reconsider or reverse its decision. For this reason, and in recognition of the importance of making the procedures as expeditious as possible for telecommunications facilities, these procedures should be altered.

First, in consultations where the ACHP has entered the process, there appears no good reason to allow the ACHP to object and appeal to itself. Doing so merely adds unnecessary expense and delay to an already overly burdensome process. Where the ACHP is participating in the consultation, the ACHP should receive the same submission packet, with the findings and supporting documentation submitted to the SHPO, at the same time it is submitted to the SHPO. If the ACHP desires to object to the finding, it should do so and communicate its comments to the agency within the original 30-day review period.

Second, the grounds triggering the appeal to the ACHP are unnecessarily broad and vague. Under this provision, a SHPO might send a finding to the ACHP and thus trigger an automatic extension of the process for at least 30 days for any reason at all, or for no reason. The ACHP is not required to respond to frivolous or unfounded objections, or in fact to objections of any kind, but as written in these amendments, the full 30-day delay from the filing of such objections is automatic and unavoidable. In order to limit unnecessary objections and minimize wasteful delay, objections that trigger a 30-day review ought to be limited to written objections that assert and substantiate a substantial likelihood of significant adverse effect, consisting of damage or destruction to a highly important historic property. Agencies and applicants should be able to expedite this process where appropriate by moving to dismiss insufficiently supported objections, and the ACHP should be required to respond to motions to dismiss within ten days.

2. Findings of "No Adverse Effect." The proposed revisions to section 800.5(c) would continue the current procedure of allowing any consulting party to object within 30 days of a finding of "no adverse effect," and the objection would require consultation and resolution with the objecting party or submission of the finding to the ACHP. The amendment also extends from 15 to 30 days the time for the ACHP to review the objection and finding and provide written comments.

Initially, PCIA is concerned by the unexplained and capricious inconsistencies between the procedures for findings of "no historic properties affected" and those for findings of "no adverse effect." As an example, why are only SHPO/THPOs allowed to object to the former, while any consulting party may object to the latter? What is the justification for limiting only to findings of "no adverse effect," the agency's option of choosing to consult with the objecting party to resolve the objection without submission to the ACHP?

As another example, if the ACHP is only likely in the rare or extraordinary case to submit to the agency head, why is an extension of the time for review from 15 days to 30 days required for all objections, even those that do not go to the agency head? Under the current rules, the ACHP has 15 days to respond, no matter how significant the

disagreement, and even where important cases require consultation with far-flung Advisory Committee members. Accordingly, PCIA believes that the explanation given in the Notice does not justify an extension of the current 15-day review period.

In addition, the Notice provides insufficient justification for the provisions allowing the ACHP to notify the agency head, instead of the agency official, "if [the ACHP] believed the issue warranted."[8] Under the current ACHP rules, the agency official is defined as a substantial government officer, with "authority over the undertaking [who] can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance." Having the authority to act for the agency, the agency official can legally discharge the agency's responsibilities to take into account effects to historic properties. Further, although Section 106 requires that the ACHP be given a reasonable opportunity to comment on these effects, the statute does not provide that the agency must treat those comments in any particular way or that they be considered by any particular official. There appears to be no legal justification for the ACHP rules to attempt to dictate to sister agencies which of their officers must receive and consider ACHP comments. Rules allowing the ACHP to direct comments to the head of another agency seem overly dramatic, giving the ACHP a kind of bureaucratic billy club, without real justification.

Given the significant costs to tower projects caused by unnecessary regulatory delays, and considering the ACHP's limited resources and ability to process large numbers of objections, PCIA submits that any appeal process for findings of both "no adverse effect" and "no historic properties affected" should be conformed, expedited and limited to only the most necessary and important cases. To achieve this, PCIA suggests the following revisions to the proposed amendments:

1. Only the SHPO should be allowed to file a written objection that triggers ACHP review of a properly proposed and documented finding by the FCC or an applicant.

2. An objection to a finding should be required to be in writing, specifying and substantiating a substantial likelihood of significant adverse effect, consisting of probable damage or destruction to a highly important historic property.

3. The standard ACHP review period should be 15 days, as it is under current law.

4. The rules should acknowledge that submitting comments to the agency official, and not to the head of the agency, is the most appropriate procedure.

[8] 68 Fed. Reg. 55354, 55355 (Sept. 25, 2003).

5. If the rules will nevertheless allow referral to the head of an agency, the standard review period should remain at 15 days, with the ACHP having the ability to extend the process for an additional 15 days, but only where necessary in those exceptional cases involving potentially significant damage to extraordinarily important historic resources, and then only where the agency head is notified and required to respond to ACHP comments. In this matter, the exception should not be allowed to swallow the rule.

6. PCIA agrees with the ACHP that Section 106 grants to SHPOs and all consulting parties 30 days to submit objections to proposed findings. The ACHP should clarify, however, that for communications projects, at the end of the 30-day period without objection from the SHPO for no effect findings, or from the SHPO or a consulting party for no adverse effect findings, the Section 106 review process is concluded without further involvement by the FCC.

7. In order to expedite the rejection of improper objections, agencies and applicants should be able to file with the ACHP motions to dismiss insufficiently supported objections, and the ACHP should be required to respond to motions to dismiss within 10 days of receipt.

8. Most importantly, the proposed rules should make it clear that the ACHP will limit its review to written objections documenting a substantial probability of significant adverse effect to a highly important historic property. The rules should specifically provide that objections that fail to meet this standard will be dismissed.

III. The Proposed Amendments Are Based On Legally Questionable Provisions of the Rules

The proposed amendments to sections 800.4(d) and 800.5(c) are based on, and inextricably entwined with, other legally questionable provisions of the ACHP rules. These provisions are inconsistent or in conflict with the terms of the NHPA. This inconsistency and conflict renders the amendments constitutionally vague and overbroad, arbitrary and capricious, an abuse of agency discretion, and otherwise not in accordance with law.

1. The Amendments Depend on an Impermissible Definition of the Phrase "Eligible for Inclusion" in Requiring Identification of Potentially Eligible Properties

The scope of application of both the current rules and the proposed amendments reaches even properties merely potentially eligible for inclusion on the National Register of Historic Places ("National Register"). This result is improper. Both the language and

history of Section 106 make clear that Section 106 review was always intended to apply only to properties that have been determined eligible for, or actually listed in, the National Register -- not to properties merely potentially eligible for inclusion in the National Register.

Under the regulations of the National Park Service ("NPS") – an entity within the Department of the Interior ("DOI") that is responsible for administering the National Register – it is the role of the Keeper of the National Register to determine the eligibility of a property for inclusion on the National Register.[9] The National Register is regularly updated and re-published each year. In addition, every February, the National Register publishes in the Federal Register an updated list of properties "determined eligible."[10]

The legislative history of the 1976 amendments to Section 106 demonstrates that in adding to Section 106 the phrase "eligible for inclusion in," Congress intended to further the principle that consultation under Section 106 was required for (1) properties already listed on the National Register or (2) properties determined eligible for listing by the Secretary of the Interior.[11]

Federal courts too have recognized that when the 1976 amendments to the NHPA extended coverage to "eligible" properties, the intent of the Act was to "afford some measure of protection to properties on which there has been some determination of eligibility for inclusion on the National Register."[12] A number of federal decisions rely

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[9] *See* 36 C.F.R. § 60.3(c) (defining "determination of eligibility" as "a decision by the Department of the Interior that a district, site, building, structure or object meets the National Register criteria for evaluation although the property is not formally listed in the National Register"); 36 C.F.R. § 60.3(f) (defining "Keeper of the National Register" as "the individual who has been delegated the authority by the NPS to list properties and determine their eligibility for the National Register"); 36 C.F.R. § 60.9 (requiring federal agencies to establish programs "to locate, inventory, and *nominate to the Secretary* all properties under the agency's ownership or control that appear to qualify for inclusion on the National Register") (emphasis supplied). *See also* 36 C.F.R. § 60.3(h) (defining National Park Service as bureau of DOI to which the Secretary of the Interior has delegated the authority and responsibility for administering the Nation Register program); 36 C.F.R. § 63.2 (setting forth process for how a federal agency can request a formal determination of eligibility from the Department of the Interior); 36 C.F.R. § 63.3 (stating that even when the federal agency and SHPO agree on the eligibility of a property, the Keeper may inform them that the property has not been "accurately defined and evaluated" therefore they may only consider the property "eligible" for purposes of obtaining comments from the Advisory Council).

[10] *See* 36 C.F.R. § 63.5 ("[P]ublic notice of properties determined eligible for the National Register will be published in the FEDERAL REGISTER at regular intervals and in a cumulative annual edition usually issued in February.").

[11] In adding the "eligible for inclusion" language to the NHPA in 1976, Congress made clear that the language was a "housekeeping amendment" and covered only properties "determined to be eligible for inclusion in the National Register." *See* S. Rep. No. 94-367, at 13 (1975), *reprinted in* 1976 U.S.C.C.A.N. 2442, 2450. Furthermore, the NPS's rules explain that "[t]he National Register is an *authoritative* guide to be used by Federal, State, and local governments, private groups and citizens to identify the Nation's cultural resources and *to indicate what properties should be considered for protection from destruction or impairment.*" 36 C.F.R. § 60.2 (emphasis supplied). Thus, under the NPS's rules, the National Register presents the universe of those properties to be protected under the preservation laws.

[12] Birmingham Realty Co. v. Gen. Servs. Admin., 497 F. Supp. 1377, 1388 (N.D. Ala. 1980). *See also* Committee to Save the Fox Building v. Birmingham Branch of the Federal Reserve Bank of Atlanta, 497 F.

on the ACHP's regulations to support their finding that Section 106 applies to properties that meet the criteria without an official determination of eligibility. These courts do not, however, address the meaning of the term "eligible for inclusion in" pursuant to its legislative history.[13]

Accordingly, the consideration of any historic properties that have not been determined eligible by the Keeper of the National Register, is beyond the scope of the NHPA. To the extent that the proposed rules reach properties merely potentially eligible for inclusion on the National Register, the ACHP must amend its rules to limit the scope of Section 106 and more truly reflect the language and intent of the NHPA.

2. The Amendments Depend on a Vague and Indecipherable Distinction Between the Definitions of the Terms "Effect" and "Adverse Effect"

The amendments to sections 800.4(d) and 800.5(c) propose different procedures for findings of "no effect to historic properties" from those for findings of "no adverse effect." The rules provide a significantly different and more complicated procedure for findings of "adverse effect."[14] PCIA believes, however, that the definitions contained in the Section 106 rules provide no practical or useable distinction between effects deemed to be adverse when compared with those deemed to be not adverse.

The ACHP's rules define "effect" as an "alteration to the characteristics of a historic property qualifying it for inclusion in, or eligibility for, the National Register."[15] The two necessary qualities for eligibility are significance and integrity. That is, for a property to qualify for the National Register, it must: (1) be associated with an important historic context; and (2) it must retain the historic integrity of those features necessary to convey the property's significance.[16]

The National Register's four criteria of significance define the association that must exist between a historic property and historically significant persons, events, characteristics or information.[17] A property's integrity is measured in one or more of

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Supp. 504, 512 (N.D. Ala. 1980) (finding property eligible under National Register criteria, but concluding that no agency had determined that the building was eligible).

[13] *See* Boyd v. Roland, 789 F.2d 347, 349 (5th Cir. 1986); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1437 (C.D. Cal. 1985).

[14] *See* 36 C.F.R. §§ 800.5 – 800.7.

[15] *Id.* § 800.16(i). This definition has been proposed verbatim in the Draft Nationwide Programmatic Agreement.

[16] *See* United States Department of the Interior, National Park Service, National Register Bulletin 15, "How to Apply the National Register Criteria for Evaluation," (Revised 1997), *available at* http://www.cr.nps.gov/nr/publications/bulletins/nrb15/ (Revised for the Internet, 1995) ("*National Register Bulletin 15*") at 3.

[17] The National Register defines the four criteria for evaluation as follows:

> The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials,

seven aspects of its physical features, including its: (1) location; (2) design; (3) setting; (4) materials; (5) workmanship; (6) feeling; and (7) association.

The ACHP's regulations define "adverse effect," as, in essence, an "effect" that diminishes one of the seven aspects of a property's integrity. Because the aspects of integrity are also the same characteristics that must be altered to find an effect, however, in practice, adverse effects differ little, if at all, from mere effects. This becomes clear when one compares the definition of effect with the definition of adverse effect in the Section 106 rules:

> Effect means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.[18]
>
> An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.[19]

As a practical matter, telecommunications projects cannot alter a property's association with significant persons or events as defined in Criteria A and B. Such projects can theoretically alter characteristics in Criterion C (such as being the "work of a master," or Criterion D (such as being able to yield information), for example by destroying the property. Such alterations, however, are also more properly considered as alterations of the integrity of the property, or its ability to convey its significance.

Under the rules then, the only difference between an effect and an adverse effect on a historic property, is that a mere effect would alter at least one of a property's seven elements of integrity, while an adverse effect would alter and diminish that same element. In the historic preservation context, however, particularly given the lack of materiality limitations, it is difficult to conceive of an effect that might alter an element of a property's historic integrity in a way that would not diminish that element of integrity. When considering historic context and authenticity, it seems that any modern alteration of

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> workmanship, feeling, and association, and: A. That are associated with events that have made a significant contribution to the broad patterns of our history; or B. That are associated with the lives of persons significant in our past; or C. That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or D. That have yielded, or may be likely to yield, information important in prehistory or history.

National Register Bulletin 15, at 2.

[18] 36 C.F.R. § 800.16(i).

[19] *Id.* § 800.5(a)(1).

a historic property is bound to equate to a diminishment of that property's historic integrity.

Therefore, the lack of a useable or understandable distinction between effect and adverse effect, and the complete lack of materiality limitations that require consideration of every effect, no matter how insignificant, render these terms in the ACHP rules unconstitutionally vague and overbroad, and distinctions in process based thereon are arbitrary, capricious and contrary to law.

3. Overbroad Rules, Compounded by Overbroad Amendments, Impose Unreasonable and Unsustainable Burdens on the ACHP's Opportunity to Comment

By accident or by design, almost every provision of the Section 106 rules dealing with the rules' scope of control or jurisdiction, seems to try to extend that control or jurisdiction as much as possible. As an example, the ACHP rules contain no significance or materiality limitations, such as those contained in the National Environmental Policy Act that limit most of that statute's key provisions only to actions that might significantly affect the environment. In contrast, the ACHP Section 106 rules seek to require agencies to examine all effects of any intensity, whether or not the effects are significant. That means that in theory and in practice, for example, all possible effects from a project must be considered, no matter how slight, insignificant or immaterial. As another example, where there is an alteration of a historic property, any diminishment of any aspect of its historic integrity, however measured and however great or small, can support a finding of adverse effect. In addition, the range of properties to which these provisions must be applied extends potentially to millions or even tens of millions of properties.[20]

Added to these provisions of extreme and unjustifiable scope, the amendments seek to allow automatic appeals to the ACHP for any "objection," the nature of which is undefined, to all findings of "no historic properties affected" and "no adverse effect." The question arises as to whether these provisions are at all designed to allow for reasonable comment from the ACHP.

The ACHP is a relatively small agency (fewer than 40 full time equivalent employees), with a small operating budget (less than $4 million annually). Despite the expansive and hopeful language in both the current Section 106 rules and the amendments proposed in the Notice, the ACHP's ability to participate in any but a handful of the many thousands of Section 106 consultations that take place every year is extremely limited. It is simply not reasonable to add to this process amendments that may increase the potential workload on the ACHP many times over, with no reasonable expectation of increased personnel or resources to handle the increased workload. The

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[20] *See* Birmingham Realty Co., 497 F. Supp. at 1388 ("[A] literal construction of the phrase "eligible for inclusion in the National Register would, under the broadly stated criteria for eligibility . . .lead almost inescapably to the conclusion that every building over fifty years old in this country is eligible for inclusion in the Register.").

inevitable result will be procedural bottlenecks, regulatory uncertainty and delay, and wasted compliance resources. In order to avoid this unfortunate and unwanted result the ACHP should adopt the limitations on appeals of findings short of adverse effect, outlined above in these comments.

IV. The ACHP Must Evaluate Impacts to Small Businesses from the Proposed Revisions to its Rules

As noted above, the proposed rules will impose new requirements on hundreds of FCC licensees and registrants, involving thousands of FCC projects, with potential effects on hundreds of thousands of potentially eligible historic properties, and legal implications for millions or even tens of millions of privately owned properties across the country. Such a far-reaching revision of the ACHP rules will undoubtedly impact small entities.

Nevertheless, the ACHP argues that there will be no effect from these rules on small entities because "the duties to take into account the effect of an undertaking on historic resources and to afford the ACHP a reasonable opportunity to comment on that undertaking are Federal Agency duties."[21]

Given that the ACHP has approved the delegation of substantial portions of the FCC's Section 106 responsibility to applicants, the ACHP is equally responsible with the FCC for assessing and reporting the impact of the rule change on small entities under the Regulatory Flexibility Act.[22] The ACHP cannot simply ignore this congressionally imposed obligation by claiming ignorance of the obvious impacts these rules will have on small-entity FCC licensees and registrants acting on delegated authority that the ACHP itself has sanctioned.

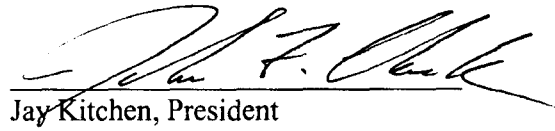
[21] 68 Fed. Reg. 55354, 55356 (Sept. 25, 2003).
[22] 65 Fed. Reg. 77698 (Dec. 12, 2000).

CONCLUSION

For the foregoing reasons, PCIA respectfully requests that the proposed revisions to the Section 106 regulations and the related provisions in the current rules be modified as suggested herein.

Respectfully submitted,

PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION



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